

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LAWRENCE L.,

Plaintiff,

CASE NO. C19-5490-MAT

V.

ANDREW M. SAUL,
Commissioner of Social Security,

Defendant.

**ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL**

Plaintiff proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, this matter is **AFFIRMED**.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1972.¹ He has a high school diploma and two years of technical college education, and has worked as a sheet metal worker. (AR 402.)

¹ Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 Plaintiff applied for DIB in February 2017. (AR 295-96.) That application was denied and
2 Plaintiff timely requested a hearing. (AR 249-51, 253-57.)

3 On November 1, 2018, ALJ Gerald Hill held a hearing, taking testimony from Plaintiff,
4 Plaintiff's counselor, and a vocational expert (VE). (AR 167-219.) On December 27, 2018, the
5 ALJ issued a decision finding Plaintiff not disabled. (AR 149-62.) Plaintiff timely appealed. The
6 Appeals Council denied Plaintiff's request for review on May 15, 2019 (AR 1-7), making the
7 ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of
8 the Commissioner to this Court.

9 **JURISDICTION**

10 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

11 **DISCUSSION**

12 The Commissioner follows a five-step sequential evaluation process for determining
13 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
14 be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not
15 engaged in substantial gainful activity since April 23, 2013, the alleged onset date. (AR 151.) At
16 step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ
17 found severe Plaintiff's bilateral labral tears, status post-right shoulder labral repair surgery, status
18 post-ulnar nerve transfer surgery, and depression. (AR 151-52.) Step three asks whether a
19 claimant's impairments meet or equal a listed impairment. The ALJ found that Plaintiff's
20 impairments did not meet or equal the criteria of a listed impairment. (AR 152-55.)

21 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
22 residual functional capacity (RFC) and determine at step four whether the claimant has
23 demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of

1 performing light work with additional limitations: he can occasionally push/pull with his bilateral
2 upper extremities. He can occasionally climb ladders, ropes, and scaffolds; frequently climb ramps
3 and stairs; occasionally crawl; and occasionally reach overhead bilaterally. He can perform simple
4 and detailed tasks and can understand, remember, and apply simple and detailed instructions. (AR
5 155.) With that assessment, the ALJ found Plaintiff unable to perform past relevant work. (AR
6 160-61.)

7 If a claimant demonstrates an inability to perform past relevant work, the burden shifts to
8 the Commissioner to demonstrate at step five that the claimant retains the capacity to make an
9 adjustment to work that exists in significant levels in the national economy. With the assistance
10 of the VE, the ALJ found Plaintiff capable of transitioning to representative occupations, such as
11 housekeeper, cashier II, and material distributor. (AR 161-62.)

12 This Court's review of the ALJ's decision is limited to whether the decision is in
13 accordance with the law and the findings supported by substantial evidence in the record as a
14 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
15 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
16 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
17 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
18 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
19 2002).

20 Plaintiff argues the ALJ erred in (1) assessing certain lay statements and (2) failing to fully
21 account for the State agency opinions. Plaintiff also argues that evidence submitted for the first
22 time to the Appeals Council undermines the ALJ's decision. The Commissioner argues that the
23 ALJ's decision is supported by substantial evidence and should be affirmed.

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Lay evidence

The record contains lay evidence in the form of written statements and hearing testimony from Plaintiff's therapist, Pamela Elderkin, M.A., LMHC, CISF; and Plaintiff's mother. (AR 200-10, 469-76, 585-585-601.) An ALJ can reject the testimony of lay witnesses only upon giving germane reasons. *Smolen v. Chater*, 80 F.3d 1273, 1288-89 (9th Cir. 1996).

Ms. Elderkin

8 In this case, the ALJ summarized Ms. Elderkin's statements and hearing testimony and
9 discounted them as inconsistent with (1) the opinions of the State agency's "licensed psychologists
10 and physicians"; and (2) Plaintiff's activities (such as driving, using a computer, managing his
11 finances, following instructions from medical providers, and maintaining social relationships).
12 (AR 159-60.) The ALJ also found that Ms. Elderkin failed to explain how Plaintiff's conditions
13 and symptoms led to the limitations she described. (AR 160.)

14 Plaintiff argues that the ALJ erred in finding that Ms. Elderkin had failed to explain how
15 Plaintiff's conditions caused the limitations she described, and the Commissioner does not respond
16 to this argument. Plaintiff also argues that the ALJ erred in suggesting that Ms. Elderkin's opinion
17 was discounted simply because it was inconsistent with the State agency opinions because the ALJ
18 did not explain why he credited the State agency opinions over Ms. Elderkin's opinions. Even
19 assuming those lines of reasoning are erroneous, the errors are harmless because the ALJ identified
20 inconsistencies between Ms. Elderkin's statements and Plaintiff's activities, which is a germane
21 reason to discount Ms. Elderkin's statements. *See Carmickle v. Comm'r of Social Sec. Admin.*,
22 533 F.3d 1155, 1164 (9th Cir. 2008). For example, Ms. Elderkin opined that Plaintiff had an
23 "extreme" limitation in his ability to understand and remember very short and simple instructions

1 (meaning his “ability to function in this area is precluded” (AR 588)), and yet the ALJ noted that
2 Plaintiff was able to prepare microwavable meals, follow instructions from healthcare providers,
3 respond to questions from medical providers, and “provide detailed historical information in
4 detailed, multipage forms[.]” (AR 160.) Although Plaintiff contends that the ALJ was required
5 to point out how the activities he cited contradicts Ms. Elderkin’s opinion (Dkt. 13 at 3), the Court
6 finds that the ALJ’s summary of Ms. Elderkin’s opinions and Plaintiff’s activities permits the
7 Court to discern the inconsistencies found by the ALJ. *See Magallanes*, 881 F.2d at 755 (“As a
8 reviewing court, we are not deprived of our faculties for drawing specific and legitimate inferences
9 from the ALJ’s opinion.”).

10 Plaintiff’s mother

11 The ALJ did not discuss Plaintiff’s mother’s third-party function report (AR 469-76) in the
12 decision. The Commissioner contends that the ALJ’s omission amounts to harmless error because
13 Plaintiff’s mother’s statement is similar to Plaintiff’s own subjective testimony, which the ALJ
14 properly discounted, and thus the ALJ’s reasons to discount Plaintiff’s testimony apply with equal
15 force to Plaintiff’s mother’s statement.

16 Plaintiff contends that his mother’s statement goes beyond what he described, specifically
17 describing how he physical reacts to pain, how he needs encouragement to start things, and how
18 he handles stress terribly. Dkt. 13 at 4. Plaintiff’s physical presentation of pain is not a relevant
19 vocational limitation, however, and the slight discrepancies that Plaintiff identifies are dwarfed by
20 the overall similarity of the statements as to Plaintiff’s daily activities and abilities. (*Compare* AR
21 420-25 *with* AR 469-74.) Furthermore, the ALJ explained why he discounted Ms. Elderkin’s
22 description of Plaintiff’s physical pain, low stress tolerance and difficulty making plans
23 independently of others (AR 159-60) in light of the evidence of Plaintiff’s activities that were

1 inconsistent with those limitations, and this reasoning applies with equal force to the similar
2 limitations described by Plaintiff's mother. Accordingly, the Court finds that the ALJ's failure to
3 address Plaintiff's mother's third-party function report is harmless error. *See Molina v. Astrue*,
4 674 F.3d 1104, 1122 (9th Cir. 2012).

5 Medical evidence

6 The State agency psychological consultants opined that *inter alia* Plaintiff "has the ability
7 to do [simple, repetitive tasks]/detailed/complex tasks, may have lapses in [concentration,
8 persistence, and pace] due to [psychological] symptoms." (AR 231, 245.) The ALJ gave
9 significant weight to the State agency opinions, finding them to be consistent with Plaintiff's
10 activities and consistent with the evidence available to the consultants. (AR 158-59.)

11 Plaintiff argues that the ALJ erred in purporting to credit the State agency opinions and yet
12 failing to mention or account for the limitation regarding his lapses in concentration, persistence,
13 and pace. Dkt. 10 at 4, Dkt. 13 at 1-2. The ALJ did, in fact, mention this limitation explicitly.
14 (See AR 158-59 (noting that the State agency consultant "opined that the claimant has the ability
15 to do simple, repetitive tasks, detailed tasks, and complex tasks, but may have lapses in
16 concentration, persistence, and pace").) Given that the ALJ listed this portion of the opinions in
17 his summary, the Court does not find that the ALJ overlooked this portion of the State agency
18 opinions.

19 Plaintiff argues that the ALJ nonetheless erred in failing to fully account for that limitation,
20 because the ALJ did not mention any lapses in concentration in the RFC assessment and the VE
21 testified that if a person is off-task more than 10% of a workday, that person cannot sustain
22 employment. (See AR 217.) The State agency opinions do not indicate that Plaintiff's lapses
23 would total more than 10% of a workday, however, and the State agency consultants did opine that

1 to whatever extent Plaintiff was limited, those limitations were not disabling. (AR 221-33, 235-
2 48.) The phrasing of the State agency opinion (“may have lapses”) also suggests speculation as to
3 the degree of limitation. Under these circumstances, the Court finds that the ALJ’s RFC
4 assessment is fully consistent with the State agency opinions, and therefore Plaintiff has not
5 established error in the ALJ’s decision in this respect. *See Turner v. Comm’r of Social Sec. Admin.*,
6 613 F.3d 1217, 1222-23 (9th Cir. 2010) (holding that an ALJ may incorporate the opinions of a
7 physician by assessing RFC limitations entirely consistent with, but not identical to limitations
8 assessed by the physician).

9 Appeals Council evidence

10 J. Alex Crampton, Psy.D., examined Plaintiff in January 2019 (the month after the ALJ’s
11 decision was issued) and completed a DSHS form opinion describing Plaintiff’s symptoms and
12 limitations. (AR 140-44.) Plaintiff submitted this opinion to the Appeals Council, which found
13 that Dr. Crampton’s opinion did not show a reasonable probability of changing the outcome of the
14 ALJ’s decision. (AR 2.) Plaintiff now argues that Dr. Crampton’s opinion undermines the ALJ’s
15 decision such that it is no longer supported by substantial evidence. *See Brewes v. Comm’r of*
16 *Social Sec. Admin.*, 682 F.3d 1157, 1163 (9th Cir. 2012) (“[W]hen the Appeals Council considers
17 new evidence in deciding whether to review a decision of the ALJ, that evidence becomes part of
18 the administrative record, which the district court must consider when reviewing the
19 Commissioner’s final decision for substantial evidence.”).

20 Plaintiff argues that Dr. Crampton’s opinion undermines the ALJ’s decision because it
21 “notes limitations far more severe than those noted in the ALJ’s RFC assessment” and was the
22 only mental-health opinion rendered by an acceptable medical source. Dkt. 13 at 5. That may be
23 true, but Dr. Crampton’s opinion post-dates the ALJ’s decision and Dr. Crampton did not review

1 any records or otherwise refer to the adjudicated period in assessing Plaintiff's limitations. (AR
2 140-44.) These circumstances distinguish this case from the case relied upon by Plaintiff (Dkt. 13
3 at 5): *Martinez v. Astrue*, 2014 WL 310387, at *19 (N.D. Cal. Jan. 28, 2014). In that case, an x-
4 ray and MRI were taken "just days and weeks after the ALJ rendered his decision[.]" but the Court
5 found that the evidence nonetheless related to the adjudicated period "because it permits a
6 comparison of the changes to Plaintiff's spine that occurred after the [earlier] MRIs were taken."
7 2014 WL 310387, at *19. There is no such purpose of comparison to the adjudicated period in
8 this case, and in fact the Appeals Council evidence suggests that Plaintiff's condition worsened
9 after the ALJ's decision was entered. (See AR 11-139 (records related to a psychiatric
10 hospitalization two months after the ALJ's decision).) Evidence that post-dates the ALJ's decision
11 and documents the worsening of an impairment that existed during the adjudicated period is not
12 relevant to the adjudicated period. See Hearings, Appeals and Litigation Law Manual I-3-3-
13 6(B)(2), available at https://www.ssa.gov/OP_Home/hallex/I-03/I-3-3-6.html (last visited Feb. 4,
14 2020).

15 Furthermore, Dr. Crampton indicated that his opinion had a six-month duration (AR 142),
16 and that his diagnoses were provisional because he had no access to records (AR 141). These
17 factors weigh against the probative value of Dr. Crampton's opinion and do not persuade this Court
18 that the opinion undermines the ALJ's decision. Accordingly, the Court finds that the Appeals
19 Council evidence does not warrant a remand in this case.

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CONCLUSION

For the reasons set forth above, this matter is AFFIRMED.

DATED this 7th day of February, 2020.



Mary Alice Theiler
United States Magistrate Judge